

# California Western Law Review

---

Volume 20 | Number 3

Article 5

---

1-1-1984

## Insured Bodily Injury Coverage: A Proposal to Replace Uninsured Motorist Coverage in California Comments

Brian D. Miller

Follow this and additional works at: <https://scholarlycommons.law.cwsl.edu/cwlr>

---

### Recommended Citation

Miller, Brian D. (1984) "Insured Bodily Injury Coverage: A Proposal to Replace Uninsured Motorist Coverage in California Comments," *California Western Law Review*: Vol. 20 : No. 3 , Article 5.  
Available at: <https://scholarlycommons.law.cwsl.edu/cwlr/vol20/iss3/5>

This Comment is brought to you for free and open access by CWSL Scholarly Commons. It has been accepted for inclusion in California Western Law Review by an authorized editor of CWSL Scholarly Commons. For more information, please contact [alm@cwsl.edu](mailto:alm@cwsl.edu).

# HEINONLINE

Citation: 20 Cal. W. L. Rev. 466 1983-1984



Content downloaded/printed from [HeinOnline](#)

Wed Sep 28 17:23:32 2016

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[Copyright Information](#)

## COMMENTS

### **Insured Bodily Injury Coverage: A Proposal to Replace Uninsured Motorist Coverage in California**

#### INTRODUCTION

"In 1896 when there were four automobiles in the United States, two were in St. Louis. They collided. Both drivers were hurt, one seriously."<sup>1</sup> The modern automobile accident victim has an advantage over the accident victims of 1896 in that automobile insurance may provide compensation for his personal injuries. The automobile insurance laws vary in all fifty states, yet each state may be classified as either a liability or no-fault state.<sup>2</sup> The statutes regulating automobile insurance in California, a liability state, are referred to as the Financial Responsibility Laws.<sup>3</sup>

This Comment will first examine the coverage provided by California's Financial Responsibility Laws which require motorists to have liability and uninsured motorist coverage. Second, this Comment will examine no-fault automobile insurance as an alternative to the Financial Responsibility Laws. Third, this Comment will propose that California modify the Financial Responsibility Laws by replacing uninsured motorist coverage with insured bodily injury coverage, a new form of coverage created by this Comment.

The liability insurance system suffers from an inequitable distribution of claim dollars which is slanted in favor of the accident victim with a minor injury and against the accident victim with a serious injury. This inequitable distribution is caused in part by the effects of expensive litigation on the claim process and in part by the disparity of coverage provided by the alternate application of liability insurance and uninsured motorist coverage.

Insured bodily injury coverage would provide a more consistent coverage for the accident victim, expand the role of arbitration in

---

1. A. TOBIAS, *THE INVISIBLE BANKERS* 303 (1982).

2. The insurance industry is primarily regulated by the state governments. The United States Congress decided to leave insurance regulation to the states in the McCarran Act (Public Law 15) of 1945.

3. CAL. VEH. CODE § 1600-42276 (Deering 1983). *See also* CAL. INS. CODE § 11580-1500 (Deering 1983) is considered a part of the Financial Responsibility Law. *See Kirkley v. State Farm Mutual Insurance Company*, 17 Cal. App. 3d 1078, 1081, 95 Cal. Rptr. 427, 428 (1971).

settling automobile insurance claims and maintain the liability system of holding responsible the motorist who negligently causes an accident for all of the accident victim's personal injuries.

## I. CALIFORNIA'S FINANCIAL RESPONSIBILITY LAWS

### A. *Mandatory Liability Insurance*

Under the liability system for compensating accident victims, the accident victim relies primarily on the liability insurance of the tortfeasor for compensation of personal injuries. Therefore, to protect accident victims, California requires motorists to have liability insurance.<sup>4</sup> Enforcement of the mandatory liability insurance law is not provided for until the motorist is involved in an accident.<sup>5</sup> Enforcement after an accident has been severely criticized as being ineffective.<sup>6</sup> Some states have compulsory insurance laws which may require proof of insurance when registering a vehicle, applying for or renewing a drivers license or when stopped by a peace officer.<sup>7</sup> A compulsory insurance law has been considered by the California legislature because of the otherwise lack of incentive for a judgment proof motorist to insure against liability.<sup>8</sup>

---

4. CAL. VEH. CODE § 16020 (Deering 1983).

5. CAL. VEH. CODE §§ 16004, 16070, 16072 (Deering 1983).

6. CAL. SENATE, FIN., INS. & COMMERCE COMM., ANALYSIS OF ASSEMBLY BILL 104 at 3 (April 24, 1981). The Transportation Committee noted the following concerning the problem:

The Department of Motor Vehicles, the Legislative Analyst and the "Little Hoover Commission" have looked into the effectiveness of the current financial responsibility law and have concluded that it is not effective. Their conclusions were based on the facts that the program costs \$3.5 million a year to operate and has not resulted in any visible reduction in the number of uninsured motorists.

CAL. SENATE TRANSP. COMM. ANALYSIS — A.B. NO. 104 (ROBINSON) 3 (August 14, 1981) (copy on file in offices of California Western Law Review).

7. See ARIZ. REV. STAT. ANN. § 28-1251-28-1260 (1956 & Supp. 1983).

8. CAL. SENATE INS. & INDEM. COMM., (Background on SB 1396 (1982)) (copy on file in offices of California Western Law Review).

For a number of years, one of the most frustrating problems to the motoring public is that of the uninsured motorist. The two solutions most commonly advocated to protect the financially responsible motorist have been "no-fault" automobile insurance (where each party insures his own assets), and strong mandatory insurance laws. Both of these solutions have been before the Legislature on a number of instances during the last 10 years and fell [sic] far-short of passage. "No-fault" automobile insurance has fell [sic] victim to the conflicting interests of insurance companies and trial attorneys, while strong mandatory laws have been defeated due to their high costs, questionable effectiveness, and a desire on the part of the Legislature not to create another bureaucracy in State Government.

*B. Uninsured Motorist Coverage*

Although motorists are required to have liability insurance, many are uninsured.<sup>9</sup> To provide protection for injuries caused by uninsured motorists, California requires insurance companies to offer uninsured motorist coverage (UMC)<sup>10</sup> to purchasers of liability insurance. Unlike liability insurance, UMC pays for injuries to an insured.<sup>11</sup> Insurance coverages which provide protection for an insured's injuries are commonly referred to a first party coverages as the insured is the first party to the insurance contract.<sup>12</sup> Liability insurance is commonly referred to as third party coverage because the accident victim who is protected is not

9. *Id.* at 1. The Department of Motor Vehicles estimates that 15.4% of reported accidents, involved drivers who are unable to show proof of financial responsibility. J. KUAN & R. PECK, STATISTICS, A PROFILE OF UNINSURED MOTORISTS IN CALIFORNIA 1 (1981) (prepared for the Research & Dev. Section Cal. Dept. of Motor Vehicles) (copy on file in offices of California Western Law Review). However, it is impossible to come up with a precise number of uninsured motorists because of nonresident driving populations and the fact many residents drive in violation of suspension and revocation orders. DMV RESEARCH & STATISTICS, A PROFILE STUDY OF THE FINANCIALLY IRRESPONSIBLE DRIVERS IN CALIFORNIA 15 (1967) [hereinafter cited as PROFILE].

10. CAL. INS. CODE § 11580.2 (Deering 1982). The Uninsured Motorist Act provides that a purchaser may waive UMC if done in writing on the form specified in CAL. INS. CODE § 11580.2(a) (2) (Deering 1982). It has been estimated that only two percent (2%) of purchasers of liability insurance waive UMC. PROFILE, *supra* note 9, at 24.

The tortfeasor must be an "uninsured motorist" for uninsured motorist coverage to apply. CAL. INS. CODE § 11580.2(a) (1) (Deering 1982). A person is an uninsured motorist if they are driving an "uninsured motor vehicle." An "uninsured motor vehicle" is one which does not have liability insurance which satisfies the minimum requirements of the Financial Responsibility Laws, *Taylor v. Preferred Risk Mut. Ins. Co.*, 225 Cal. App. 2d 80, 83, 37 Cal. Rptr. 63, 64 (1964). An uninsured motor vehicle also may be one driven by a hit and run driver who cannot be identified. *Orpustan v. State Farm Mut. Auto Ins. Co.*, 7 Cal. 3d 988, 990, 500 P.2d 1119, 1120, 103 Cal. Rptr. 919, 920 (1972); *Esparza v. State Farm Mut. Auto. Ins. Co.*, 257 Cal. App. 2d 496, 65 Cal. Rptr. 245 (1967). However, the hit and run vehicle must make "physical contact" with the insured or his vehicle. CAL. INS. CODE § 11580.2(b) (1) (Deering 1982). An uninsured motor vehicle may be one in which the liability insurance company denies coverage or is unable to make payment due to insolvency. CAL. INS. CODE § 11580.2(b) (Deering 1982). For a more complete discussion of what an uninsured motor vehicle is, see P. EISLER, CALIFORNIA UNINSURED MOTORIST LAW HANDBOOK §§ 4.1-5.7 (3d. ed. 1979 & Supp. 1983) [hereinafter cited as EISLER, HANDBOOK]; A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE §§ 2.29-2.48 (1969 & Supp. 1981) [hereinafter cited as WIDISS, GUIDE]; CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA UNINSURED MOTORIST PRACTICE § 1.23 (1973 & Supp. 1983) [hereinafter cited as C.E.B.].

11. CAL. INS. CODE § 11580.2(b) (Deering 1982). The term "insured" means the named insured and the spouse of the named insured, while residents of the same household, relative of either while occupants of a motor vehicle or otherwise, heirs and any other person while in or upon or entering into or alighting from an insured motor vehicle. For a complete discussion of who is an insured, see EISLER, HANDBOOK, *supra* note 10, at §§ 3.1-3.10.

12. R. KEETON, INSURANCE LAW 245 (1971).

a party to the insurance contract.<sup>13</sup>

As a first party coverage, UMC is unique as coverage is contingent upon the liability of another person. Other first party coverages, such as health insurance, are payable regardless of fault, and are therefore no-fault coverages.<sup>14</sup> Therefore, UMC is a hybrid coverage with characteristics of liability and no-fault insurance.<sup>15</sup>

One advantage of first party coverage is that the claimant is a party to the contract and will be bound by an arbitration clause in the insurance policy.<sup>16</sup> California requires disputed UMC claims to be settled by arbitration.<sup>17</sup> The California courts have given the standard arbitration clauses in UMC broad interpretation in keeping with the "strong legislative policy favoring arbitration."<sup>18</sup>

After payment of an UMC claim, the insurance company is subrogated to the rights of the insured party.<sup>19</sup> Therefore, UMC does not benefit the tortfeasor, it merely provides protection

13. Note, *First Party Bad Faith—Is There an Adequate Remedy in Kansas After Spencer v. Aetna Life and Casualty Co.*? 29 KAN. LAW REV. 277 n.4 (1981).

14. R. KEETON, INSURANCE LAW 244 (1971).

15. R. KEETON, INSURANCE LAW 245 (1971). "The uninsured motorist coverage of the automobile insurance policy is a hybrid coverage. It is fault-based like liability insurance, but first party like accident insurance." *Id.*

16. Since the claimant to a first party coverage is considered to be a party to the insurance contract, the arbitration clause which provides for an agreement to arbitrate future disputes will be binding on him. Therefore, courts will generally enforce arbitration agreements for uninsured motorist coverage. However, at common law, arbitration agreements were unenforceable. WIDISS, GUIDE, *supra* note 10, at § 6.3. Arbitration clauses in uninsured motorist coverage endorsements are still unenforceable in Arkansas, Georgia, Indiana, Kansas, Louisiana, Missouri, Montana, Nebraska, Oklahoma, South Carolina, Tennessee, Utah, and Virginia. 2 I. SCHERMER, AUTOMOBILE LIABILITY INSURANCE § 33.02 (1981).

17. CAL. INS. CODE § 11580.2(f) (Deering 1982).

18. Most states require that coverage issues be adjudicated in court. WIDISS, GUIDE, *supra* note 10, at § 6.19. In California, the arbitrator decides the entirety of the dispute. *Orpustan v. State Farm Mut. Automobile Ins. Co.*, 7 Cal. 3d 988, 991, 500 P.2d 1119, 1121, 103 Cal. Rptr. 919, 921 (1972). To hold otherwise would deprive the insured of the value of arbitration as a speedy remedy under the Uninsured Motorist Coverage statute. CAL. INS. CODE § 11580.2. As indicated in Felner, to require that a court preliminarily decide "jurisdiction facts" in a case where the insured is "legally entitled to recover damages from the owner or operator of uninsured automobile" would have the effect of turning a procedure designed to furnish prompt, continuous, expert and inexpensive resolution of a controversy into one carrying all the burdens and delays of civil litigation, overlaid by jurisdictional uncertainty between successive tribunals. *Id.* "Likewise, any doubts as to the meaning or extent of an arbitration agreement are for the arbitrators and not the court to resolve." *Cothron v. Interinsurance Exch. of the Automobile Club of Southern California*, 103 Cal. App. 853, 859, 163 Cal. Rptr. 240, 244 (1980) (quoting *Morris v. Zuckerman*, 69 Cal. 2d 686, 690, 446 P.2d 1000, 1003-04, 72 Cal. Rptr. 880, 883-84 (1968)).

However, a court will not compel arbitration where it is undisputed that the tortfeasor was covered by liability insurance. *See Pagett v. Hawaiian Ins. Co.*, 45 Cal. App. 3d 620, 119 Cal. Rptr. 536 (1975).

19. CAL. INS. CODE § 11580.2(g) (Deering 1982). The party seeking the benefit of subrogation must have paid a debt due to a third person before he can be substituted to that person's rights. *Commercial Union Ins. Co. v. City of San Jose*, 127 Cal.

against the inability of an insured to recover damages from the tortfeasor.

*C. Uncertainty in the Coverage Provided by the Financial Responsibility Laws*

The alternative application of third party coverage liability insurance, and a first party coverage (UMC), creates uncertainty in the amount of coverage an accident victim will receive and places a burden upon the accident victim of determining which insurance applies. Generally, the accident victim is provided greater protection if his claim is against his own UMC than if it is against the liability insurance of the tortfeasor due to the problems of the underinsured motorist and the diluted liability policy.<sup>20</sup>

California requires that liability and UMC coverage limits be at least \$15,000 per person injured in an accident.<sup>21</sup> However, liabil-

---

App. 2d 730, 739, 179 Cal. Rptr. 814, 819 (1982); *Arp. v. Blake*, 63 Cal. App. 362, 367, 218 P. 773 (1923).

20. Despite the inadequacy of the tortfeasor's liability insurance, the UMC insured will not be covered by UMC unless he can show the tortfeasor is an uninsured motorist, CAL. INS. CODE § 11580.2(a) (Deering 1983). In rare cases the accident victim will have been covered by liability insurance and UMC. If the tortfeasor is an out of state motorist with liability insurance coverage limits less than the minimum required in California then he is classified as an uninsured motorist and the insured is entitled to UMC benefits. *Calhoun v. State Farm Mut. Automobile Ins. Co.* 254 Cal. App. 2d 407, 409-10, 62 Cal. Rptr. 177, 178-79 (1967); *Taylor v. Preferred Risk Mut. Ins. Co.*, 225 Cal. App. 2d 80, 82, 37 Cal. Rptr. 63, 65 (1964). The insured is also entitled to the full coverage of the UMC and the liability insurance despite the subrogation provision in UMC. *Kirkley v. State Farm Mut. Ins. Co.* 17 Cal. App. 3d 1078, 95 Cal. Rptr. 427 (1971).

There is a split among the authorities as to whether a permissive driver is an uninsured motorist, *see* C.E.B., *supra* note 10, at § 1.27 (1973); EISLER, HANDBOOK, *supra* note 10, at § 4.3. If an UMC insured is injured due to the fault of more than one motorist, one insured and one uninsured, he will be covered by the liability insurance of the joint tortfeasor and his own UMC. *Security National Ins. Co. v. Hand*, 31 Cal. App. 3d 227, 107 Cal. Rptr. 439 (1973).

There are also rare cases in which, despite the tortfeasor having liability insurance, the UMC insured will be entitled to neither liability insurance coverage nor UMC. If an UMC insured is injured in a no-fault state and is thereby precluded from a tort claim against the party at fault he will not be covered by UMC. *State Farm Mut. Automobile Ins. Co. v. Crockett*, 103 Cal. App. 3d 652, 163 Cal. Rptr. 206 (1980). An UMC insured may be denied liability insurance coverage and UMC if he is intentionally injured. In *Farmers Ins. Exch. v. Hansel*, 12 Cal. App. 3d 570, 90 Cal. Rptr. 654 (1970), the court sidestepped the issue of whether UMC covers intentional torts; however, the court did say that "[t]he pertinent section of the Insurance Code serves the purpose for which it was enacted only if its scope is limited to that of requiring reimbursement to the insured by his own carrier of the type of loss which would have been covered by an automobile liability policy had the uninsured motorist been in fact insured." *Id.* at 574, 90 Cal. Rptr. at 656 (footnote omitted). Since it is illegal to buy or sell liability insurance for intentional torts, CAL. INS. CODE § 533 (Deering 1983), *Clemmer v. Hartford Ins. Co.*, 22 Cal. App. 3d 865, 587 P.2d 1098, 151 Cal. Rptr. 285 (1978), the UMC may not cover intentional torts as it is not the type of loss which liability insurance covers.

21. CAL. VEH. CODE § 1656(a) (Deering 1982).

ity may be limited under liability insurance or UMC to \$30,000 per accident no matter how many people are injured.<sup>22</sup> These are the minimum coverage limits at which UMC and liability insurance may be sold in California.<sup>23</sup> If greater coverage is purchased, the accident victim may be entitled to greater than the minimum coverage. However, the accident victim is not entitled to any UMC no matter how high his coverage limits are if the tortfeasor has the minimum coverage limits for liability insurance. Therefore, if an UMC insured with coverage limits of \$100,000 per person and \$200,000 per accident suffers injuries worth \$95,000 he will be limited to the \$15,000 of the tortfeasor's liability insurance. However, if that same accident victim was injured by an uninsured motorist he would be entitled to the full \$95,000.

When a tortfeasor has liability insurance with coverage limits less than the coverage limits of the victim's UMC he is commonly referred to as an "underinsured motorist."<sup>24</sup> The incentive for a motorist to provide greater protection for themselves by purchasing UMC with greater coverage limits is diminished by the possibility that the insured motorist may be injured by an underinsured motorist. Recently, several insurance companies have started to offer "underinsured motorist coverage" to fill the gap between the limits of the tortfeasor's liability insurance and the victim's UMC limits.<sup>25</sup>

Even if the coverage limits of liability insurance of the tortfeasor and the insured's UMC are equal the insured may suf-

---

22. *Id.*

23. *Id.*

24. An underinsured motorist is sometimes defined as a party with liability insurance that does not meet the minimum coverage limits for policies issued in California; see *Kirkley v. State Farm Mut. Ins. Co.*, 17 Cal. App. 3d 1078, 95 Cal. Rptr. 427 (1971). This Comment refers to underinsured motorists as any motorist with liability insurance less than the UMC limits of the insured victim.

25. Recently, the California Legislature considered requiring insurance companies to offer underinsured motorist coverage. S.B. 1396, Cal. Leg. 1981-82 Reg. Sess. (Sterling). Mandatory underinsured motorist coverage was opposed by the insurance industry.

Not all insurers offer this coverage, however, as it creates reinsurance problems for smaller insurance companies and it can result in expensive case management problems for companies offering the coverage. With underinsured motorist coverage, a company cannot adequately ascertain its losses and its coverage until all special and general damages have been settled or adjudicated and until after the insurance coverage of the adverse party has been discovered. This creates great uncertainty and will mean that case files will routinely remain open for a longer time, eating up more of the expense dollar.

Letter from George W. Tye, Executive Manager, Association of California Insurance Companies, to Brian D. Miller (Oct. 1, 1982) (copy on file in offices of California Western Law Review). For a discussion of underinsured motorist coverage, see EISLER, HANDBOOK, *supra* note 10, at § 4.4(a) (1979); WIDISS, GUIDE, *supra* note 10, at § 2.37a.



fer from the problem of the diluted liability insurance. Liability insurance becomes diluted when the tortfeasor injures more than two people seriously as the actual coverage the liability insurance provides to any one injured person may be less than the stated coverage limit per person. The injured party will be precluded, from UMC if the tortfeasor has liability insurance with the minimum coverage limits even if the liability insurance does not provide a single dollar of actual coverage.<sup>26</sup> UMC may also become diluted, but UMC is less likely to become diluted as the injured victims may be covered by different policies which contain UMC.<sup>27</sup> Underinsured motorist coverage does not provide protection against diluted liability insurance as it only provides protection for the difference in coverage limits between liability insurance and UMC.<sup>28</sup>

The fundamental flaw in the coverage provided by the financial responsibility laws is that an accident victim must rely primarily

---

26. See *Pagett v. Hawaiian Ins. Co.*, 45 Cal. App. 3d 620, 119 Cal. Rptr. 536 (1975); *Travelers Ins. Co. v. Bouzer*, 39 Cal. App. 3d 992, 114 Cal. Rptr. 651 (1974). The judicial interpretation of the purpose of Uninsured Motorist Coverage is only to provide the minimum protection that the tortfeasor's liability would have provided, if available. However, the legislative history indicates that the California Legislature was concerned with inadequate liability insurance. H.R. Res. 192, Cal. Leg. (1957). "Whereas, judgments in personal injury cases are often inadequate to compensate for the economic loss and frequently are uncollectable in cases where the defendant is not insured or are only partially collectable where he is underinsured." Some states allow recovery under UMC when the liability insurance is diluted; see, e.g., *Porter v. Empire Fire and Marine Ins. Co.*, 106 Ariz. 274, 277, 475 P.2d 258, 261 (1970).

27. If the victims are covered by different policies containing UMC they may be entitled to collect from the different policies and thus the UMC will not be diluted. If an accident victim is covered by more than one UMC he will not be allowed to "stack" the coverages and will be limited to the amount of coverage provided by the UMC with the highest coverage limits. This is due to "other insurance" clauses contained in UMC endorsements which allow the insurer to prorate their coverage limits against other UMC available to the insured. CAL. INS. CODE § 11580.2(d) (Deering 1983). *Mid-Century Ins. Co. v. Koch*, 11 Cal. App. 3d 1019, 90 Cal. Rptr. 280 (1970). If the victims were in a vehicle with UMC then they may not be covered by any other UMC because of "similar insurance" clauses even if another UMC provides higher limits. CAL. INS. CODE § 11580.2(h) (2) (Deering 1983). See also *California State Automobile Ass'n Inter-Ins. Bureau v. Huddleston*, 68 Cal. App. 3d 1061, 137 Cal. Rptr. 690 (1977); *Inter-Ins. Exch. of the Automobile Club of Southern California v. Alcivar*, 95 Cal. App. 252, 156 Cal. Rptr. 914 (1979). Many insurance companies do not take full advantage of the similar insurance clause. See also *Grunfeld v. Pacific Automobile Ins. Co.*, 232 Cal. 4, 8, 42 Cal. Rptr. 516, 520 (1965). If more than two victims are injured in the same vehicle which has UMC, then the UMC of that vehicle may become diluted. However, it is more likely a liability insurance policy will become diluted rather than UMC as the victims may be pedestrians or in different vehicles or not restricted by the similar insurance clause.

28. "'UNDERINSURED MOTOR VEHICLE' means . . . a vehicle . . . to which a bodily injury liability bond or policy applies at the time of the accident but its limit for bodily injury liability is less than the limit of liability for this coverage." *Pacific National Ins. Co., Underinsured Motorist Coverage Form P53043 (6-81)* (copy on file in offices of California Western Law Review).

on the liability insurance of the tortfeasor over which he has no control and which provides less protection than UMC. UMC provides relatively consistent and reliable coverage. However, the alternative application of liability insurance and UMC places the difficult legal and factual determination as to which insurance applies on the accident victim.<sup>29</sup> If the accident victim wants to collect from UMC he must prove the tortfeasor was an uninsured motorist.<sup>30</sup>

#### D. The Liability System and Lawsuits

The liability system of compensating accident victims has been severely criticized over the last twenty years for being unfair and excessively expensive.<sup>31</sup> Disputes between accident victims and insurance companies concerning liability insurance claims are ultimately decided by lawsuits. Primarily due to the expense and delay of the judicial system the courts are not a desirable forum to handle disputes arising from automobile accidents.<sup>32</sup>

Often the seriously injured victim will incur substantial medical bills and will be disabled throughout the settlement period. Thus, the seriously injured victim needs the recovery to pay current medical bills and other living expenses. The victim is therefore susceptible to inducement to accept a settlement for substantially less than the value of his claim.<sup>33</sup> When an insurance company delays payment to the seriously injured to induce him to settle for

29. See *supra* note 20.

30. Usually the accident victim initiates arbitration, thus he has the burden of proof and burden of going forward. See *infra* note 73.

It may be difficult to determine if another motorist is insured because:

A. The other motorist may be a hit and run driver whose identity may later be determined. CAL. INS. CODE § 11580.2(b) (1) (Deering 1982). *Orpustan v. State Farm Mut. Auto. Ins. Co.*, 7 Cal. 3d 998, 500 P.2d 1119, 103 Cal. Rptr. 919 (1972).

B. The other motorist may be unwilling to provide his insurance status until faced with a lawsuit in an effort to delay or avoid an adverse effect on his insurance premiums.

C. It may be questionable whether a liability policy was in force at the time of the accident. When the tortfeasor has recently acquired liability insurance or renewed it after a lapse in coverage it may take weeks or months to verify coverage.

D. It may also be questionable whether the tortfeasor was insured under a particular liability policy. For instance, there may be a question as to whether he was a permissive driver. If he was not a permissive driver the owner's insurance would not cover the accident. CAL. VEH. CODE § 17150 (Deering 1982). *Jordan v. Consolidated Mut. Ins. Co.*, 59 Cal. App. 3d 26, 130 Cal. Rptr. 446 (1976).

31. See generally R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE ACCIDENT VICTIM (1965); J. O'CONNELL, ENDING INSULT TO INJURY (1975); M.G. WOODROOF, J. FONSECA & A. SQUILLANTE, AUTOMOBILE INSURANCE AND NO-FAULT LAW (1974 & Supp. 1980) [hereinafter cited as NO-FAULT LAW].

32. R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE ACCIDENT VICTIM 3 (1965) [hereinafter cited as BASIC PROTECTION].

33. See generally BASIC PROTECTION, *supra* note 32, at 2; P. PRETZEL, UNINSURED MOTORISTS at 190 (1972).

less it is commonly referred to as “starving out a claimant.”<sup>34</sup>

Conversely, when negotiating a claim for a minor injury the victim has the advantage. The victim with a minor injury can generally afford to wait for a trial. The insurance company knows this and wants to avoid litigation expenses. Therefore, to avoid the expense and uncertainty of trial, the insurance company is likely to offer a substantial settlement.<sup>35</sup> These claims are commonly referred to as “nuisance claims.”<sup>36</sup>

Automobile accidents happen within seconds.<sup>37</sup> Therefore, the delay in waiting for trial may make it difficult to prove liability as witnesses’ memories become blurred with time.<sup>38</sup> Furthermore, the delay may also result in the unavailability of a witness. In addition, the tremendous number of automobile accident cases on the court dockets creates an immeasurable social cost by increasing public court costs and delaying the adjudication of other lawsuits.<sup>39</sup>

The inefficiencies and inequities of the liability system have provided the incentive for the spawning of a variety of no-fault statutes in approximately one-half of the states.<sup>40</sup> The relative merits of the liability and no-fault systems are beyond the scope of this Comment. However since no-fault has been seen by most of the critics of the liability system as the solution to its problems, an

---

34. “They know if they pay the living expenses of the claimant, the claimant is going to be more difficult to deal with. If they starve the claimant, hold the money back, the claimant will be easier to deal with.” CAL. LEGIS., SENATE COMMITTEE ON INSURANCE AND FINANCIAL INSTITUTIONS, PUBLIC HEARING ON NO-FAULT AUTOMOBILE INSURANCE at 37 (Dec. 15, 1977) (speaker, Wylie Aitken, President of the California Trial Lawyers Ass’n) [hereinafter cited as PUBLIC HEARING] (copy on file in offices of California Western Law Review).

35. DEPT OF INS. & DEPT OF CONSUMER AFFAIRS OF THE STATE OF CALIFORNIA, THE TIME HAS COME FOR NO-FAULT (1973). See also P. PRETZEL, UNINSURED MOTORISTS 190 (1972); BASIC PROTECTION, *supra* note 32, at 2.

36. NO-FAULT, *supra* note 31, at § 16:49.

37. L. GREEN, TRAFFIC VICTIMS—TORT LAW AND INSURANCE 66 (1958).

38. A. TOBIAS, THE INVISIBLE BANKERS (1982).

“In the days of poor roads and low speeds,” wrote Richard Nixon in 1936, “the fact of an accident could be reconstructed in a court room with some degree of accuracy, and problems of determining fault did not present unusual difficulties. But with high powered cars and concrete highways, the probability that an accident—often the consequence of a fractional mistake in management—can and will be described accurately in court has become increasingly remote, especially where court congestion has delayed the time of trial.”

39. BASIC PROTECTION, *supra* note 32, at 13-15. See also *infra* note 50.

40. No-Fault statutes have been enacted in: Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Nevada, New Hampshire, New York, North Dakota, Oregon, Pennsylvania, Puerto Rico, South Carolina, South Dakota, Texas, Utah, Virginia, Wisconsin. 4 R. LONG, THE LAW OF LIABILITY INSURANCE 28-31 (1981). Nevada is the only state to repeal no-fault. I. SCHERMER, AUTOMOBILE LIABILITY INSURANCE xiv (1981).

examination of no-fault is necessary before any meaningful reform is proposed.

## II. NO-FAULT AUTOMOBILE INSURANCE

No-fault is first party coverage which compensates for injury regardless of fault. Generally, first party coverages such as medical, dental, collision, fire and disability insurance, are no-fault.<sup>41</sup> Usually, no-fault insurance only provides protection for economic losses. For example, you would not expect your dental insurance to pay you for pain and suffering you incurred while having root canal work. However, if you sued your dentist for malpractice you would expect his liability insurance to cover your pain and suffering. Likewise, no-fault automobile insurance is restricted to very specific economic losses incurred as a result of personal injuries incurred in an accident.<sup>42</sup>

The first no-fault statute was enacted in Massachusetts in 1971.<sup>43</sup> There are as many varieties of no-fault as there are no-fault statutes.<sup>44</sup> Many no-fault statutes provide that disputes will be settled by arbitration.<sup>45</sup> Some no-fault statutes permit subrogation by the insurance company even though benefits are paid to the victim regardless of fault.<sup>46</sup> However, almost all no-fault statutes can be categorized as either threshold no-fault or add-on no-fault.<sup>47</sup>

### A. Threshold No-Fault

Under a threshold no-fault statute a party cannot bring an action against the tortfeasor for damages not paid by no-fault such as pain and suffering unless he has suffered a serious injury.<sup>48</sup> The purpose of this restriction is to prevent expensive litigation

41. Uninsured motorist coverage is an exception to the rule that first party coverages are no-fault. See *supra* note 15 and accompanying text.

42. Economic loss consists of reasonable expenses incurred and time lost from work. BASIC PROTECTION, *supra* note 32, at 8.

43. Originally enacted August 13, 1970, 1970 Mass. Acts 760. The province of Saskatchewan enacted a statute with some no-fault features in 1946. Sask. Rev. Stat. 409 (1965). I. SCHERMER, AUTOMOBILE LIABILITY INSURANCE § 1.01, at 102 (1981).

44. For a discussion of different no-fault plans see 4 LONG, THE LAW OF LIABILITY INSURANCE (1981); NO-FAULT LAW, *supra* note 31 (1974). There has been an attempt within the Congress to require all states to enact no-fault statutes. NO-FAULT LAW, *supra* note 31, at § 18:20 (1974). For a discussion of the constitutionality of a Federal No-Fault Law see 4 B. LONG, THE LAW OF LIABILITY INSURANCE § 28 (1981).

45. I. SCHERMER, AUTOMOBILE LIABILITY INSURANCE §§ 33.01-33.10 (1981).

46. *Id.* at 9-11.

47. Keeton, *Compensation Systems and Utah's No-Fault Statute*, UTAH L. REV. 383, 386-87 (1973).

48. *Id.* at 383, 387.

concerning minor injuries.<sup>49</sup>

An injured party is classified as seriously injured and thus entitled to a tort action against the tortfeasor if he has met a threshold requirement.<sup>50</sup> A “dollar threshold” sets a minimum dollar amount of medical bills a victim must incur before he will be classified as seriously injured.<sup>51</sup> “Dollar thresholds” are susceptible to abuse as the dollar amount is a tempting target for the victim, his attorney, and his doctor.<sup>52</sup>

A “disability threshold” establishes the minimum length of time a victim must be disabled before he is seriously injured.<sup>53</sup> The temptation to prolong injury has generally made the “disability threshold” ineffective.<sup>54</sup>

The trend is towards a “verbal threshold” which allows the victim to sue in tort for certain types of serious injuries.<sup>55</sup> One problem with the “verbal threshold” is that it is difficult to precisely define which types of injuries meet the threshold.<sup>56</sup> In addition, the degree of injury cannot be predetermined by the type of injury suffered thus this threshold is inherently arbitrary.

49. Although not statutorily explicitly stated, the No-Fault statute appears to be aimed at prompt compensation for victims of motor vehicle accidents for “substantially all of their economic loss” without regard to fault . . . . [I]t was hoped that the Act would help to reduce case loads by eliminating minor claims in terms of the dollar amounts which nevertheless took up significant court time and to reduce insurance premiums. *Pascente v. Stoye*, 116 Misc. 2d 641, 456 N.Y.S.2d 633, 635 (City Ct. 1982) (citation omitted).

50. *Herman v. Haney*, 98 Mich. App. 445, 296 N.W.2d 278 (1980). *Fidler v. MacKinder*, 113 Mich. App. 523, 317 N.W.2d 672 (1982), *Harris v. St. Johnsbury Trucking Co., Inc.*, 57 A.D.2d 127, 393 N.Y.S.2d 611 (1977).

51. *Arno v. Kennedy*, 88 A.D. 754, 451 N.Y.S.2d 476 (1982); PUBLIC HEARING, *supra* note 34, at 5 (Statement of Mr. McCabe, Allstate Ins. Co.).

52. PUBLIC HEARING, *supra* note 34, at 6 (Statement of Mr. McCabe, Allstate Ins. Co.); *Licari v. Elliot*, 57 N.Y.2d 230, 235, 441 N.E.2d 1088, 1090, 455 N.Y.S.2d 570, 572 (1982).

53. PUBLIC HEARING, *supra* note 34, at 6 (Statement of Mr. McCabe Allstate Ins. Co.).

54. *Id.*

55. *Id.* at 6-7, *e.g.*, a serious injury for purposes of the No-Fault Act is one which results in a significant limitation of use of body function or system. *Licari v. Elliot*, 57 N.Y.2d 230, 235, 441 N.E.2d 1088, 1090, 455 N.Y.S.2d 570, 572 (1982). In order to meet a No-Fault Act threshold of “serious impairment,” the initial injury must be severe or its effects must be continuing. Factors to be considered are extent of residual impairment, and prognosis for eventual recovery, although additional relevant factors may also be considered. *Herman v. Haney*, 98 Mich. App. 455, 457, 296 N.W.2d 278, 280 (1980).

56. Question of fact for the jury. *Herman v. Haney*, 98 Mich. App. 445, 296 N.W.2d 278 (1980). Question for the judge. *Licari v. Elliot*, 57 N.Y.2d 230, 441 N.E.2d 1088, 455 N.Y.S.2d 570 (1982). It is especially difficult to define serious injury when the plaintiff alleges psychological injury. *See Lacombe v. Bland Central School Dist.*, 116 Misc. 2d 585, 455 N.Y.S.2d 994 (1982).

### B. *Add-On No-Fault*

Add-on no-fault statutes provide first party coverage for economic losses as does threshold no-fault.<sup>57</sup> However, add-on no-fault does not restrict tort actions by the victim of an accident.<sup>58</sup> For this reason add-on no-fault statutes are favorably compared to threshold no-fault statutes by many attorneys.<sup>59</sup> If add-on no-fault is compulsory it will require some motorists to needlessly duplicate existing coverages such as medical and workers compensation insurance.<sup>60</sup>

### C. *California and No-Fault*

The California legislature has considered various threshold no-fault automobile insurance proposals.<sup>61</sup> While the legislature's decision not to implement no-fault has been attributed to political influences, the decision may be justified on the basis of problems no-fault states are having with automobile insurance.

Generally, the implementation of no-fault has not reduced insurance premiums.<sup>62</sup> In some cases, insurance rates have risen dramatically after no-fault has been implemented.<sup>63</sup> In addition, since all no-fault states allow tort liability under some circumstances the motorist still needs liability insurance and UMC.<sup>64</sup> The reduction of tort liability reduces tort liability inefficiencies and inequities but creates litigation concerning the application of

57. Keeton, *Compensation Systems and Utah's No-Fault Statute*, UTAH L. REV. 383, 387 (1973).

58. *Id.* See ARK STAT. ANN. § 66-4014 (1947 & Supp. 1983), MARYLAND CODE ANN. art. 48A § 538-46 (1972).

59. See PUBLIC HEARING, *supra* note 34, at 34-35 (Statement of Mr. Wylie Aitken, President of California Trial Lawyers Association).

60. See *infra* note 66 and accompanying text.

61. See generally PUBLIC HEARING, *supra* note 34.

62. 4 R. LONG, THE LAW OF LIABILITY INSURANCE 27-34 (1981). The proponents of no-fault say it will reduce premiums and give instant payment to every accident victim. But no plan under consideration in or enacted by any state or territory affords instant adequate cash, problem free for such victims. Under any of the no-fault plans proposed or enacted some victims would get much more than under the tort system and some much less. "The promise of big permanent rate reductions is unrealistic, if not fraudulent. Massachusetts, the first state to enact no-fault, had the highest insurance rates in the country before and after no-fault." *Id.* 27-8.3.

63. PUBLIC HEARING, *supra* note 34, at 15 (Statement of Vice Chairman Beverly).

I attended a conference sponsored by the National Conference of State Legislators on no-fault and there were Massachusetts' representatives claiming it was working. Then I was in Boston and reading a whole series of editorials and articles on the insurance problems in Massachusetts and the costs were horrendous for a young driver in Boston. I think it was several thousand dollars annual charge.

*Id.*

64. P. PRETZEL, UNINSURED MOTORISTS 198 (1972).

no-fault thresholds.<sup>65</sup>

Many of the benefits provided by no-fault are duplicated by other coverages. Californians may already be covered by medical payments coverage in their automobile insurance policy, medical or health insurance or a disability income policy.<sup>66</sup> The coverage which no-fault eliminates, pain and suffering and other losses of a noneconomic nature, are not duplicated by any other insurance.

The most emotional argument against no-fault is that compensation regardless of fault, encourages careless driving.<sup>67</sup> In effect, the innocent victim gives up his pain and suffering coverage as a coverage trade-off for the economic losses of the motorist who causes his own injury.

Any decision to implement no-fault should be based on the view that it is better to require that all motorists be self-insured for their economic losses than to allow accident victims injured through the fault of others to receive full compensation for their injuries. This Comment does not reach that philosophical question but instead suggests a framework for reform of the liability system which should correct the present inefficiencies and inequities.<sup>68</sup>

---

65. See, e.g., *Licari v. Elliot*, 57 N.Y.2d 230, 441 N.E.2d 1088, 455 N.Y.S.2d 570 (1982); *Lacomb v. Poland Central School Dist.*, 116 Misc. 2d 585, 455 N.Y.S.2d 994 (1982); *Arno v. Kennedy*, 88 A.D.2d 754, 451 N.Y.S.2d 476 (1982); see also *supra* note 50.

66. [No-fault] is merely a mandatory program of self-insurance to cover medical and disability income. Statistics tell us that here in California some 80% of our citizens already have some form of no-fault insurance, whether it is through a group medical plan through their union, whether it is a group medical plan they've obtained through their employment, or whether or not it's a disability income policy or some other benefit that is available in an already existing plan.

PUBLIC HEARING, *supra* note 34, at 34 (Statement of Wylie Aitken, President of the California Trial Lawyers Ass'n).

Most insurance companies offer medical payments coverage in the automobile policy which is a form of no-fault. NO-FAULT LAW, *supra* note 31, at § 5.2; see also BASIC PROTECTION, *supra* note 32, at 7.

67. PUBLIC HEARING, *supra* note 34, at 39 (Statement of Wylie Aitken, President of the California Trial Lawyers Ass'n):

catastrophe accidents, those that involve claim of \$25,000 or above, . . . , that about 40% of all those payments were going to single car drivers, most of whom were under the influence of alcohol who left the highway and ran into a tree or something else. Now that amounts to basically a socialized welfare system of compensating people who brought about their own injury.

*Id.*

68. The fault v. no-fault battle has resulted in very few innovative ideas on how to reform the fault system. 4 R. LONG, THE LAW OF LIABILITY INSURANCE 28-16 (1981).

### III. INSURED BODILY INJURY COVERAGE

#### A. *The Coverage*

Insured Bodily Injury Coverage (IBIC) is a new coverage which this Comment has created to demonstrate a modification in California's Financial Responsibility Laws which would provide a more efficient and equitable insurance coverage. Experience with UMC over the last twenty-five years in California has shown that a first party coverage payable only upon the fault of another, provides better protection than the liability insurance of a tortfeasor.<sup>69</sup> Insured Bodily Injury Coverage is based on the premise that all insured accident victims should be entitled to the same type of protection that UMC provides even if they are not injured by an uninsured motorist.

IBIC is a first party coverage modeled after UMC but provides a much broader coverage. While UMC only provides protection against injuries caused by an uninsured motorist, IBIC would provide protection against injuries caused by another motorist's fault whether or not the other motorist was insured.<sup>70</sup>

The victim insured by IBIC would not be limited to the liability insurance of the tortfeasor. Therefore, the IBIC insured will avoid the hardships incurred by an UMC insured when injured by an underinsured motorist or a motorist with diluted liability insurance.<sup>71</sup> Since the IBIC insured could recover from his own policy, he would not be affected by the inadequacy of the tortfeasor's liability insurance. The actual coverage that the tortfeasor's liability insurance provides is a problem to be encountered by the insurance company in a subrogation action.<sup>72</sup>

Currently an UMC insured victim must determine and prove the insurance status of the tortfeasor before recovery.<sup>73</sup> Under the

---

69. See generally *supra* notes 20-30 and accompanying text.

70. As IBIC is very similar to UMC the modification of The Uninsured Motorist Act, CAL. INS. CODE § 11580.2 (Deering 1983) to provide coverage regardless of the insurance status of the tortfeasor would make it an IBIC statute. The details of an IBIC statute, such as the role of "similar" and "other" insurance clauses are not dealt with by this Comment.

71. See generally *supra* notes 20-30 and accompanying text.

72. There is potential for conflict between the insurance companies' subrogation rights and the victims' rights when more than one motorist is liable for the insured's injuries. The conflict would exist if one of the tortfeasors was insured while the other was not; the IBIC insurer and the IBIC insured would assert rights to the liability insurance. UMC applies if any of the tortfeasors was an uninsured motorist. Cal. State Auto. Ass'n Inter-Ins. Bureau v. Huddleston, 68 Cal. App. 3d 1061, 137 Cal. Rptr. 690 (1977). Inter-Ins. Ex. of the Auto Club of S. Cal. v. Alcivar, 95 Cal. App. 3d 252, 156 Cal. Rptr. 914 (1979). The Legislature should decide this issue when drafting the statute.

73. The insurance company ordinarily does not initiate arbitration. Since the victim must initiate the arbitration he "may be compelled to assume both the burden



IBIC claim the insurance status of the tortfeasor would not be relevant since IBIC would pay whether or not the tortfeasor is insured. However, the insurance company would still be interested in the tortfeasor's insurance status in a subsequent subrogation action.

The insurance company is the proper party to bear the burden of investigating and determining the insurance status of the tortfeasor since they are the more qualified than the insured. They have more time to determine insurance status of the tortfeasor as they do not need their claim settled in order to meet their living expenses.<sup>74</sup> IBIC and UMC provide the same coverage for injuries caused by an uninsured motorist. Thus, the implementation of an IBIC statute would cause UMC to become obsolete.<sup>75</sup>

After payment of an IBIC claim, the insurance company would proceed against an uninsured motorist in a subrogation lawsuit as is presently done in UMC cases.<sup>76</sup> However, the implementation of IBIC would present an opportunity to implement a more efficient and equitable claims procedure where the tortfeasor is an insured motorist.

### *B. Consolidated Arbitration*

Since IBIC is a first party coverage, the California Legislature could provide that all IBIC claim disputes shall be settled by arbitration.<sup>77</sup> The expanded coverage of IBIC would drastically reduce lawsuits between accident victims and liability insurance companies as a relatively expedient and efficient arbitration proceeding would be available to accident victims regardless of the insurance status of the tortfeasor.<sup>78</sup> Thus, insurance companies would be prevented from starving out claimants.<sup>79</sup>

Insurance companies usually settle subrogation disputes between themselves. Therefore, it is likely that an insurance company would be involved with an arbitration proceeding to settle an IBIC claim and an arbitration proceeding to recover the IBIC payment in a subrogation action. It would also be possible that the insurance company subrogated against would be involved

---

of going forward and the burden of persuasion." WIDISS, GUIDE, *supra* note 10, at § 6.30. See also *supra* note 30.

74. The legal and factual determination of the tortfeasor's insurance status may be very difficult. See *supra* notes 10, 20 and 30.

75. See *supra* note 70.

76. See *supra* note 19 and accompanying text.

77. See *supra* note 16.

78. See *supra* note 39 and accompanying text.

79. See *supra* note 33 and 34 and accompanying text.

with an IBIC arbitration with one or more of their insureds. To prevent inconsistent results and wasteful repetition, all of the arbitration proceedings stemming from an automobile accident should be consolidated when feasible. Therefore, the California Legislature should require insurance companies to settle IBIC subrogation disputes by consolidated arbitration.

California has a statute which allows the state courts to consolidate arbitration proceedings even when the parties have not specifically agreed to consolidated arbitration.<sup>80</sup> This statute could be used to consolidate IBIC arbitrations.<sup>81</sup> However, the Legislature may wish to require IBIC policies to include consolidated arbitration clauses so the arbitration proceedings could be consolidated without a court order.<sup>82</sup> Thus, the arbitration administrator may decide when IBIC arbitration proceedings would be consolidated.<sup>83</sup>

Consolidated arbitration would prevent inconsistent results by determining issues common to more than one arbitration proceeding.<sup>84</sup> For instance, the arbitrator could determine the amount of the insured's damages for the purpose of the IBIC claim and the subrogation action. Thus, the IBIC insurance company will not

80. CAL. CIV. PROC. § 1281.3 (Deering 1981).

The section permits consolidation of arbitration proceedings when "(1) Separate arbitration agreements or proceedings exist between the same parties; or one party is a party to a separate arbitration agreement or proceeding with a third party; and (2) The disputes arise from the same transactions or series of related transactions; and (3) There is common issue or issues of law or fact creating the possibility of conflicting rulings by more than one arbitrator or panel of arbitrators."

Keating v. Superior Court of Alameda County, 31 Cal. 3d 584, 612, n.19, 645 P.2d 1192, 1208, n.19, 183 Cal. Rptr. 360, 376 n.19 (1982).

81. The insurance company would have a separate arbitration agreement with a third party since it would have an agreement to arbitrate with other insurers and with the IBIC insured. CAL. CIV. PROC. § 1281.3(1) (1982).

82. Under the California consolidated arbitration statute it is necessary for a court to order the consolidation as the separate arbitration agreements may set up different arbitration procedures. The court can "mold the method of selection and the number of arbitrators to implement the consolidated proceedings." Keating v. Superior Court of Alameda County, 31 Cal. 3d 584, 612, 645 P.2d 1192, 183 Cal. Rptr. 360, 377 (1982).

83. In New York, the arbitrator administrator consolidates disputes except when impracticable. *American Arbitration Association Rules for New York State No-Fault Arbitration and No-Fault Expedited Arbitration*, p. 3.

84. While referring to class wide arbitration the California Supreme Court recently stated:

Because the principles of res judicata and collateral estoppel do not apply in arbitration proceedings, any issue resolved against a party . . . in one arbitration proceeding would have to be decided anew in a subsequent arbitration, resulting in needless duplication and the potential for inconsistent awards.

Keating v. Superior Court of Alameda County, 31 Cal. 3d 584, 612, n.19, 645 P.2d 1192, 1208, n.19, 183 Cal. Rptr. 360, 376 n.19 (1982).

pay more than it can recoup in subrogation if the tortfeasor has adequate liability insurance. When fault is at issue the arbitrator is more likely to make the correct determination if several parties to the accident have an interest in the proceeding. Therefore, the reproduction of witnesses and other evidence for separate arbitration proceedings seems especially wasteful.

In order for consolidated arbitration to save time and money it must work in harmony with the court system. If some issues must routinely be settled in court, arbitration will not provide the speedy remedy for which it is designed.<sup>85</sup> Therefore, the IBIC statute should make clear the scope of arbitrable issues and give them the same broad interpretation as is done with UMC.<sup>86</sup> The greatly increased role of arbitration may require state supervision of the manner in which arbitration is administered. California's Department of Insurance could oversee the manner in which arbitrators are selected and whatever else is necessary to ensure fairness in the proceedings. As the California courts have liberally interpreted the statute that provides for consolidated arbitration, it is likely they would also give IBIC consolidated arbitration room to operate.<sup>87</sup>

### C. *A Proposed Tort Limitation*

For IBIC to be an effective deterrent to nuisance lawsuits, direct actions against tortfeasors and liability insurance companies must be eliminated or discouraged. By limiting damages in such actions to direct economic losses, the victim will probably choose arbitration where he can obtain a full tort recovery.<sup>88</sup> The limitation would create an additional incentive for the uninsured motorist to become insured since only IBIC insureds would be entitled to pain and suffering damages.<sup>89</sup>

There are several situations in which the rationale for the limi-

---

85. *See supra* note 18.

86. *Id.*

87. In *Keating v. Superior Court of Alameda County*, 31 Cal. 3d 584, 645 P.2d 1192, 183 Cal. Rptr. 360 (1982) the California Supreme Court interpreted the consolidated arbitration statute as providing for class wide arbitration of a dispute between the Seven-Eleven franchise owners and the Southland Corporation. *See also Conejo Valley Unified School Dist. v. William Blurock and Partners, Inc.*, 111 Cal. App. 3d 983, 169 Cal. Rptr. 102 (1980).

88. UMC may be waived by the purchaser. To encourage arbitration and better coverage for accident victims IBIC should be mandatory. This should not pose an undue burden as only two percent (2%) of purchasers waive UMC. The DMV has recommended that purchasers not be allowed to waive UMC. *Report and Recommendations of the Financial Responsibility Study Committee*, January, 1967.

89. The California Legislature recently considered a bill which would preclude uninsured motorists from recovering liability insurance claims until other claims were settled against them. Cal. Leg., AB-104 § 28, 1981-82 Reg. Sess. (Robinson).

tation on damages fails. In these instances the limitation should not be allowed. First, when the tortfeasor is an uninsured motorist, there is no possibility of a nuisance claim and a limitation would serve to discourage the uninsured from buying insurance. Second, when the victim's IBIC has been depleted the limitation does not encourage arbitration. Third, when the victim does not have IBIC and their role in the accident was as a passenger or as a pedestrian. Passengers and pedestrians as a class are not responsible for obtaining automobile insurance, thus they should not be penalized for failing to do so.<sup>90</sup>

The tort limitation would not only drastically reduce nuisance claims but would also help in preventing insurance fraud. The automobile insurance industry is very susceptible to insurance fraud.<sup>91</sup> Nearly anyone can obtain automobile insurance and the lack of communication between insurance companies prevents them from knowing when a person is covered by more than one insurance company. If insurance companies know claim disputes will be settled in consolidated arbitration, they will have to communicate with each other concerning the insurance status of the parties to an accident. By encouraging communication within the insurance industry, consolidated arbitration and the tort limitation will help to prevent insurance fraud.

### CONCLUSION

The present liability system of compensating automobile accident victims is inefficient and inequitable. Since UMC was adopted in the late 1950's to solve the uninsured motorist problem, the only meaningful reform that has been proposed is no-fault automobile insurance. UMC has worked despite its unique characteristic as a first party coverage payable only upon the liability of another party for a loss. In many instances, the accident victim has better protection from UMC when injured by an uninsured motorist than if injured by a motorist with liability insurance despite the role of liability insurance as the primary source of compensation for accident victims. The fundamental flaw of the tort system is reliance by the victim on the insurance of the tortfeasor.

The adoption of a first party coverage regardless of the insur-

---

90. The motorist from out of state might also be forgiven for not carrying IBIC. No-fault states may deny the out of state motorist his tort recovery and first party benefits. *See Gersten v. Blackwell*, 111 Mich. App. 418, 314 N.W.2d 645 (1982).

91. Insurance companies insist that they are losing billions of dollars annually on fraudulent claims—costs that they insist they must pass on to other insurance buyers. The companies estimate the ten percent (10%) of all automobile claims are fake, at a cost of about \$1.5 billion a year. J. O'CONNELL, *THE LAWSUIT LOTTERY* 18 (1979).

ance status of the tortfeasor would eliminate the problem of the underinsured motorist and lessen the impact of the diluted liability insurance problem. Additionally, first party coverage based on fault with subrogation rights against the tortfeasor's liability insurance presents an opportunity for the implementation of consolidated arbitration and for speedy and efficient dispute resolution.

This Comment has proposed the California Legislature adopt Insured Bodily Injury Coverage to replace Uninsured Motorist Coverage. Only the skeleton of IBIC has been described in this Comment. The fleshing out of IBIC with appropriate exclusions and limitations must be a joint effort of the California Legislature, the insurance industry, and the people of California. The purpose of this Comment is to demonstrate that accident victims cannot rely on the automobile liability insurance of tortfeasors for efficient, equitable, and consistent coverage. A first party coverage must and can be adopted for this purpose with ultimate responsibility for careless driving remaining with the careless driver.

*Brian D. Miller*